



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

APR 18 2008

Reply To: ORC-158

Chairman Brian Cladoosby
Swinomish Tribe of the Swinomish
Indian Tribal Community
Post Office Box 817
La Conner, Washington 98257

Re: Approval of the Swinomish Indian Tribal Community for Treatment in the Same Manner as a State (TAS) for Sections 303(c) and 401 of the Clean Water Act

Dear Chairman ^{Brian} Cladoosby:

The purpose of this letter is to let you know that the U.S. Environmental Protection Agency (EPA) Region 10 has completed our review of the Swinomish Indian Tribal Community of Washington (Tribe) application for "treatment in the same manner as a State (TAS)." I would like to inform you that EPA approves your application for TAS under Section 518(e) of the Federal Clean Water Act (CWA).

After reviewing the application and comments provided by the State of Washington, EPA finds that the Tribe meets the eligibility criteria of Section 518(e) of the CWA and EPA regulations at 40 CFR § 131.8(a). Therefore, the Swinomish Indian Tribal Community is eligible to adopt water quality standards and seek EPA approval, pursuant to Section 303(c) of the CWA, and to certify that discharges comply with those water quality standards, pursuant to Section 401 of the CWA, for all surface waters of the Swinomish Reservation. Enclosed is a copy of EPA's decision document for this TAS approval.

We appreciate all of the efforts of your staff during EPA's review to respond to questions and to provide additional information to supplement the initial application. As the Tribe moves forward with adopting water quality standards and seeking EPA approval, my staff is looking forward to working with the Tribe on this project. If you have any questions, you can contact me at (206) 553-1234, or you can contact Sally Brough of my staff at (206) 553-1259, or Rich McAllister, Regional Counsel at (206) 553-8203.

Sincerely,

A handwritten signature in black ink, appearing to read "Elin D. Miller".

Elin D. Miller
Regional Administrator

Enclosure

- 1. Decision Document**
- 2. Appendix I Findings of Fact**
- 3. Appendix II Response to Comments**

cc: Mr. Tom Laurie
Washington Department of Ecology
Ms. Emily Hutchison
Mr. Todd Mitchell

We appreciate all of the efforts of your staff during EPA's review to respond to questions and to provide additional information to supplement the initial application. As the Tribe moves forward with adopting water quality standards and seeking EPA approval, my staff is looking forward to working with the Tribe on this project. If you have any questions, you can contact me at (206) 553-1234, or you can contact Sally Brough at (206) 553-1295 or Rich McAllister at (206) 553-8203.

Sincerely,

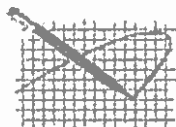
Elin D. Miller
Deputy Regional Administrator

Enclosure

cc: Emily Hutchinson
Tod Mitchell
Tom Laurie, Washington Dept. of Ecology

b5 deliberative process





Fred Leutner /DC/USEPA/US
04/18/2008 07:21 AM

To Brough.Sally@epamail.epa.gov,
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cc "Denise Keehner" <Keehner.Denise@epamail.epa.gov>,
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Subject b5 deliberative process



-----Sent by EPA Wireless E-Mail Services

DECISION DOCUMENT:

**APPROVAL OF THE SWINOMISH INDIAN TRIBAL COMMUNITY
APPLICATION FOR TREATMENT IN THE SAME MANNER AS A STATE
FOR SECTIONS 303(c) AND 401 OF THE CLEAN WATER ACT**

Table of Contents

I.	Introduction and Selected Documents	2
A.	Introduction	2
B.	Selected Documents	2
1.	Application and Supporting Materials	2
2.	Letters and Related Documents from EPA	3
3.	Governmental Entity Comments Regarding Tribal Authority	3
4.	Capability Review	4
5.	Statutory and Regulatory Provisions	4
6.	Policy Statements	4
II.	Requirements for TAS Approval	4
A.	Federal Recognition	5
B.	Substantial Governmental Duties and Powers	5
C.	Jurisdiction Over Waters "Within the Borders" of the Swinomish Indian Reservation	7
1.	Map or Legal Description	7
2.	Identification of the Surface Waters for which the Tribe Proposes to Establish Water Quality Standards	8
3.	Statement Describing Basis for the Tribe's Authority Over Reservation waters	9
D.	Capability	12
III.	Conclusion	13
When review is complete, verify that page citations are accurate		
Appendix I	Findings of Fact	
Appendix II	Response to Comments	

I. Introduction and Selected Documents

A. Introduction

Section 303(c) of the Clean Water Act (CWA) requires the States to develop, review and revise (as appropriate) water quality standards for surface waters of the United States. At a minimum, such standards must include designated water uses, in-stream criteria to protect such uses, and an antidegradation policy. 40 C.F.R. § 131.6. In addition, Section 401 of the CWA provides that States may grant, condition, or deny "certification" for Federally permitted or licensed activities that may result in a discharge to the waters of the United States. The decision to grant or deny certification is based on the State's determination regarding whether the proposed activity will comply with, among other things, water quality standards it has adopted under Section 303. If a State denies certification, the Federal permitting or licensing agency is prohibited from issuing a permit or license.

Section 518(e) of the CWA authorizes EPA to treat an eligible tribe in the same manner as a state (TAS) for certain CWA programs, including Sections 303 and 401. EPA regulations establish the process by which EPA implements that authority and determines whether to approve a tribal application for TAS for purposes of administering Section 303(c) and 401 of the CWA. See 56 Fed. Reg. 64876 (December 12, 1991), as amended by 59 Fed. Reg. 12814 (March 23, 1994) (codified at 40 C.F.R. Part 131).

This Decision Document provides the basis and supporting information for EPA's decision to approve a TAS eligibility application (the "Application") from the Swinomish Indian Tribal Community ("SITC" or the "Tribe") for Section 303(c) and Section 401 of the CWA, pursuant to Section 518(e) of the CWA and 40 C.F.R. Part 131. CWA Section 518(e)(2) authorizes EPA to treat a tribe in the same manner as a state for water resources "within the borders of an Indian reservation." This Decision Document approving the Tribe as eligible for TAS applies to all surface waters identified by the Tribe that lie within the exterior borders of the Swinomish Indian Reservation, as described in the Application. The Swinomish Indian Tribal Community asserts it has the authority to manage and protect water quality within the boundaries of the Swinomish Indian Reservation as described in the Treaty of Point Elliot, January 22, 1855, as modified by an Executive Order issued by President Grant on September 9, 1873.

B. Selected Documents

The following documents comprise a portion of the record for this decision.

1. Application and Supporting Materials

The Tribe's Application for TAS for purposes of the water quality standards and certification programs under Sections 303 and 401 of the CWA includes the following letters and related documents from the Tribe and its legal counsel:

June 14, 2006 letter from Ann E. Tweedy, Tribal Attorney, to L. Michael Bogert, EPA Regional Administrator, presenting the Application for treatment as a state, with Exhibits 1-29 (Initial Application)(which together with the First and Second Supplemental Submission comprise the Application).

June 28, 2007 letter from Emily R. Hutchinson, Tribal Attorney, to Richard McAllister, EPA Region 10 Assistant Regional Counsel, presenting "Supplemental Submissions in Support of Swinomish TAS Application", with Exhibits 1-37 (First Supplemental Submission).

February 20, 2008 letter from Emily R. Hutchinson, Tribal Attorney, to Richard McAllister, EPA Region 10 Assistant Regional Counsel, presenting "Second Supplemental Submissions in Support of Swinomish TAS Application", with Exhibits 126 (Second Supplemental Submission).

2. Letters and Related Documents From EPA

June 29, 2006 letter from L. Michael Bogert, EPA Regional Administrator, to The Honorable Christine Gregoire, Governor of the State of Washington, offering an opportunity to comment on the Tribe's Application for TAS, as provided at 40 C.F.R. § 131(8)(c)(2), enclosing the Application and a public notice of the comment opportunity published in several local newspapers.

September 20, 2007 letter from Elin D. Miller, EPA Regional Administrator, to Gov. Gregoire, offering an opportunity to comment on EPA's Proposed Findings of Fact and the First Supplemental Submission for the Tribe's Application for TAS, enclosing the First Supplemental Submission and a public notice of the comment opportunity published in several local newspapers.

February 28, 2008 letter from Richard G. McAllister, EPA Assistant Regional Counsel, to Tom Laurie and Melissa Gildersleeve, Washington Department of Ecology, enclosing the Second Supplemental Submission for the Tribe's Application for TAS.

3. Governmental Entity Comments Regarding Tribal Authority

By letter dated August 4, 2006, the State of Washington submitted comments to EPA on the Tribe's assertion of authority in the Application. These comments are addressed in the Response to Comments, Appendix II.

By letter dated October 26, 2007, the State of Washington submitted comments to EPA on its Proposed Findings of Fact. EPA has adopted the proposed Finding of Facts in final form as the Findings of Fact document, which is included as Appendix I to this Decision Document, and has addressed comments in the Response to Comments, Appendix II.

4. Capability Review

By memorandum dated March 18, 2008, Sally Brough, EPA Region 10's Water Quality Standards Coordinator, reviewed the capability of the Tribe to administer the water quality standards and certification programs and, as explained below, determined that the Tribe has adequate capability.

5. Statutory and Regulatory Provisions

- a. Section 518(e) of the Clean Water Act, 33 U.S.C. § 1377(e), authorizes EPA to treat an eligible Indian tribe in the same manner as a state if it meets specified criteria.
- b. "Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations," 56 Fed Reg. 64876 (December 12, 1991) (codified at 40 C.F.R. Part 131), establish the requirements for a tribe to obtain TAS approval.

6. Policy Statements

- a. EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 11, 1984, as reaffirmed most recently by EPA Administrator Johnson on September 26, 2005.
- b. EPA Memorandum entitled "EPA/State/Tribal relations", by EPA Administrator Reilly, July 10, 1991.
- c. Memorandum entitled "Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations," by Robert Perciasepe and Jonathan Cannon, March 19, 1998.

II. Requirements for TAS Approval

Under CWA Section 518(e) and EPA's implementing regulation at 40 C.F.R. § 131.8(a) four requirements must be satisfied before EPA can approve a tribe's TAS application for water quality standards under Section 303(c) and certification under Section 401. These are: (1) the Indian tribe is recognized by the Secretary of the Interior and exercises authority over a reservation; (2) the Indian tribe has a governing body carrying out substantial governmental duties and powers; (3) the water quality standards program to be administered by the Indian tribe pertains to the management and protection of water resources that are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and (4) the Indian tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

EPA's regulation at 40 C.F.R. § 131.8(b) identifies what must be included in an application by an Indian tribe for TAS to administer a water quality standards program. EPA separately reviews tribal water quality standards under 40 C.F.R. § 131.21, and TAS approval under 40 C.F.R. § 131.8 does not constitute an approval of such standards. But approval of a tribe for TAS for purposes of water quality standards does authorize that tribe to issue certifications under Section 401 of the CWA, see 40 C.F.R. § 131.4(c), provided that the tribe designates a "certifying agency" as defined in 40 C.F.R. § 121.1(e).

A. Federal Recognition

EPA can approve a TAS application for water quality standards under Section 303 and certification under Section 401 only from an "Indian tribe" that meets the definitions set forth in CWA Section 518(h) and 40 C.F.R. § 131.3(k) and (l). See 40 C.F.R. § 131.8(a)(1). The term "Indian tribe" is defined as "any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation." CWA § 518(h)(2), 40 C.F.R. § 131.3(l). The term "Federal Indian Reservation" means "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." CWA § 518(h)(1), 40 C.F.R. § 131.3(k).

The Swinomish Indian Tribal Community is included on the Secretary of the Interior's list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs". 72 Fed. Reg. 13648, 13651 (March 22, 2007). Furthermore, as discussed below, the Tribe is exercising governmental authority over a reservation within the meaning of the CWA. Thus, EPA has determined that the Tribe meets the requirements of 40 C.F.R. § 131.8(a)(1) and (b)(1).

B. Substantial Governmental Duties and Powers

To show that it has a governing body currently carrying out substantial governmental duties and powers over a defined area, 40 C.F.R. § 131.8(b)(2) requires that the tribe submit a descriptive statement that should: (i) describe the form of the tribal government; (ii) describe the types of governmental functions currently performed by the tribal governing body; and (iii) identify the source of the tribal government's authority to carry out the governmental functions currently being performed.

The Tribe's Application relies in part on EPA's previous approvals of the Tribe's TAS Applications for CWA Section 106 and Section 319(h) grants, noting that when EPA approved the Tribe as eligible for TAS to receive those grants, it found that the Tribe had adequately described the form of Tribal government, the governmental functions the government performs, and the source of Tribal authority to carry out those functions. A tribe that has previously shown that it meets the "governmental functions" requirement for purposes of another EPA program need not make that showing again. See 59 Fed. Reg. 64339, 64340 (December 14, 1994) (regulation simplifying TAS

process). EPA's review and approval of the Section 106 and Section 319 Applications described the basis for its determination that the statements supporting those TAS eligibility determinations established that the Tribe meets the "duties and powers" requirement.

The Application describes the governmental functions that the Swinomish Indian Tribal Community currently performs. Examples of the governmental functions the SITC performs include law enforcement, functions related to health, education, and welfare, and functions related to zoning and environmental protection. To carry out these functions, the SITC employs approximately one hundred individuals, including police officers, medical professionals, managers, scientists, and all the other personnel necessary to carry out the duties of a sovereign Indian nation.

Power is vested in the General Council, which consists of all members of the SITC of voting age. The General Council meets once a year. During the rest of the year, the General Council delegates its authority to the Senate, whose members are elected from the General Council by secret ballot.

In terms of law enforcement and social services, the SITC employs ten police officers, including the Chief. It also employs a probation officer and a number of social workers who provide services that are often court-ordered, such as alcohol and domestic violence counseling. The SITC has a contractual arrangement to utilize the Skagit County jail and the jail of the Nisqually Indian Tribe for incarceration of persons convicted of crimes. As noted below, the Planning Department and Housing and Utility Authorities also perform various civil enforcement functions.

The SITC employs a doctor, a dentist, three nurse practitioners, and about a dozen associated employees to provide health, education, and welfare services. The SITC has a daycare program and a "Birth-to-Six" program. It also works extensively with nearby schools to help meet the unique needs of Tribal youth. The SITC runs a satellite branch of the Northwest Indian College.

SITC maintains tribal housing for the majority of Tribal members who live in the area. SITC also supplies drinking water and sewage disposal for Tribal members and non-tribal members who live in the more densely populated locations on the Reservation. SITC provides various social services, in addition to the ones previously mentioned, including mental health and alcohol counseling. The SITC administers a zoning code, issues building permits and inspects new construction, and otherwise performs the functions of a planning or building department.

The Fisheries Office and the Skagit River System Cooperative, which is a cooperative venture with another Indian tribe, employ nearly two dozen individuals, including biologists, managers, and administrative staff to manage the fishing and hunting resources of the SITC and to conduct scientific research and monitoring regarding fisheries and habitat restoration.

The Tribe also exercises its authority as a sovereign to impose and collect taxes. The SITC levies taxes on several of the different economic activities subject to Tribal jurisdiction. Those taxes are: Utility Business Activity Tax, Retail Food and Beverage Tax, Tobacco Tax, Tribal Employment Rights Office (TERO) Tax, and Fish Tax.

EPA has determined that the Tribe's submissions in its Application and supplemental information, including information regarding the prior TAS Applications and approvals, adequately demonstrate that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. Thus, the Tribe meets the requirements in 40 C.F.R. §§ 131.8 (a)(2) and (b)(2).

C. Jurisdiction Over "Waters Within the Borders" of the Swinomish Indian Reservation.

Under 40 C.F.R. § 131.8(b)(3), the Tribe is required to submit a statement of its authority to regulate water quality. The statement should include: (i) a map or legal description of the area over which the tribe asserts authority over surface water quality; (ii) a statement by the tribe's legal counsel (or equivalent official) that describes the basis for the tribe's assertion of authority, which may include a copy of documents such as tribal Constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions that support the Tribe's assertion of authority; and (iii) an identification of the surface waters for which the tribe proposes to establish water quality standards. 40 C.F.R. § 131.8(b)(3).

1. Map or Legal Description

The Tribe has submitted maps and a legal description of the Reservation. The SITC's Application describes features of and activities on the Swinomish Indian Reservation. The Reservation, located in the State of Washington north of Seattle, consists of approximately 10,450 acres of land, of which 7,450 acres are uplands and approximately 3,000 acres are tidelands. For purposes of this Application, the Reservation boundary extends to the historical midpoint of the Swinomish Slough (Slough), to the extreme low water tide mark of the southern and western waters surrounding the Reservation, and to a line that trends east from the extreme low water mark of Turner's Bay then heads north to the extreme low water mark of Padilla Bay, as further described and depicted in the Second Supplemental Submission. The Regulatory Boundaries Map, attached as Exhibit 7 to the Initial Application, provides a good general representation of the historical midpoint of the Slough and the extreme low water mark on the southern, western, and northern sides of the Reservation based on survey, photographic, and historical data from a variety of sources the Tribe has gathered. However, the actual Reservation boundaries may differ from those depicted in the Regulatory Boundaries Map because the extreme low water mark is not permanently fixed.

EPA has determined that the Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(i) by providing a map and legal description of the area over which the Swinomish Indian Tribal Community asserts authority to regulate surface water quality.

2. Identification of Surface Waters for which the Tribe Proposes to Establish Water Quality Standards.

The Tribe's Application states that the Tribe's water quality standards will apply to all waters within the existing boundaries of the Reservation, as described in the Treaty of Point Elliot of 1855 and modified by an Executive Order of September 1873. The Reservation consists of all the lands and waters within the exterior boundaries of the Reservation. For purposes of the TAS Application, the Reservation includes tidelands surrounding the Reservation and the waters which overlie the tidelands, and the area known as McGlinn Island and other parcels of land east of the Swinomish Channel described in the Second Supplemental Submission. The tidelands extend to the extreme low water mark of the south, west, and north sides of the Reservation, which border waterways, and include the Swinomish Channel, at least to the historical midpoint of the Slough.

The Application specifically identifies the following 13 water bodies that are wholly or partially within the Reservation boundaries.

1. Padilla Bay
2. Padilla Bay Lagoon
3. Similk Bay
4. Turner's Bay
5. Kiket Bay
6. Lone Tree Lagoon
7. Lone Tree Creek
8. Skagit Bay
9. Skagit River Delta
10. Snee-Oosh Creek
11. Swinomish Channel
12. Munks Creek
13. Fornsby Creek

The SITC also proposes to establish standards for all named and unnamed palustrine and marine wetlands, named and unnamed intermittent streams, unnamed springs and seeps, and all delineated, inventoried, undelineated, and uninventoried wetlands wholly or partially within the Reservation boundaries.

EPA has determined that the Tribe has satisfied 40 C.F.R § 131.8(b)(3)(iii) by identifying the surface waters over which it proposes to establish water quality standards.

3. Statement describing basis for the Tribe's authority over Reservation Waters

The Swinomish Indian Tribal Community has identified the legal authorities pursuant to which the Tribe performs its governmental functions. The Application and supplemental submissions include statements by the Tribe's legal counsel describing the basis of the Swinomish Indian Tribal Community's authority. The Swinomish Indian Tribal Community is organized pursuant to a Constitution and By-Laws originally adopted in 1935. The Swinomish Indian Tribal Community is governed by its constitutionally-formed Swinomish Senate and the General Council, which includes the voting population of the Tribe. The Constitution provides specific powers for the Tribe to exercise civil regulatory authority over ground and surface water pollution on the Reservation.

CWA Section 518(e)(2) authorizes EPA to treat a tribe in the same manner as a state for water resources "within the borders of an Indian reservation". EPA has interpreted this provision to require that a tribe show authority over the water resources for which it seeks TAS approval. 56 Fed. Reg. at 64880. The Tribe has asserted that it has authority to set water quality standards and issue certifications for all surface waters, including those that it has identified, that are within the Reservation boundaries as described in the Application. As explained in the analysis below, which also considers the information contained in the Findings of Fact of Appendix I to this Decision Document, EPA is determining that the Swinomish Indian Tribal Community has inherent authority over nonmember activities for purposes of the water quality standards and water quality certification programs under the Clean Water Act.

EPA analyzes a tribe's water quality authority under the CWA over activities of nonmembers on nonmember-owned fee lands under the test established in *Montana v. United States*, 450 U.S. 544 (1981) (*Montana test*). In *Montana*, the Supreme Court held that absent a federal grant of authority, tribes generally lack inherent jurisdiction over nonmember activities on nonmember fee land. However, the Court also found that Indian tribes retain inherent sovereign powers to exercise civil jurisdiction over nonmember activities on nonmember-owned fee lands within the reservation where (i) nonmembers enter into "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or (ii) "...[nonmember] conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* At 565-66. In analyzing tribal assertions of inherent authority over nonmember activities on fee lands on Indian reservations, the Supreme Court has reiterated that the *Montana* test remains the relevant standard. See, e.g., *State v. A-1 Contractors*, 520 U.S. 438, 445 (1997) (describing *Montana* as "the pathmarking case concerning tribal civil authority over nonmembers"); see also *Nevada v. Hicks*, 533 U.S. 353, 358 (2001) ("Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in [*Montana*]").

In the preamble to EPA's 1991 water quality standards regulation, the Agency noted that, in applying the *Montana* test and assessing the impacts of nonmember

activities on fee lands on an Indian tribe, EPA will rely upon an operating rule that evaluates whether the potential impacts of regulated activities on the tribe are serious and substantial. 56 Fed. Reg. at 64878-79. EPA also recognized that the analysis of whether the *Montana* test is met in a particular situation necessarily depends on the specific circumstances presented by the tribe's application. *Id.* at 64878. In addition, EPA noted as a general matter "that activities which affect surface water and critical habitat quality may have serious and substantial impacts" and that, "because of the mobile nature of pollutants in surface waters and the relatively small length/size of stream segments of other water bodies on reservations. . . any impairment that occurs on, or as a result of, activities on non-Indian fee lands [is] very likely to impair the water and critical habitat quality of the tribal lands." *Id.* EPA also noted that water quality management serves the purpose of protecting public health and safety, which is a core governmental function critical to self-government. *Id.* at 64879.

The Clean Water Act addresses the maintenance and restoration of the physical, chemical, and biological integrity of waters of the United States, including tribal waters, by providing that tribes treated in the same manner as states, act to "prevent, reduce, and eliminate pollution." CWA Section 101(b). CWA Section 518(e) authorizes tribes to carry out CWA functions that "pertain to the management and protection" of reservation water resources. The *Montana* test analyzes whether the tribe is proposing to regulate activity that "threatens" or "has some direct effect" on tribal political integrity, economic security, or health or welfare. That test does not require a tribe to demonstrate to EPA that nonmember activity "is actually polluting tribal waters," if the tribe shows "a potential for such pollution in the future," *Montana v. EPA*, 141 F. Supp. 2d 1249, 1262 (D. Mont. 1998), quoting *Montana v. EPA*, 941 F. Supp. 945, 952 (D. Mont. 1996), *aff'd* 137 F.3d 1135 (9th Cir. 1998), *cert denied* 525 U.S. 921 (1988). Thus, EPA considers both actual and potential nonmember activities in analyzing whether a tribe has authority over nonmember activities under the Clean Water Act.

EPA recognizes that under well-established principles of federal Indian law, a tribe retains attributes of sovereignty over both its lands and its members. *See e.g. California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975). Further, tribes retain the "inherent authority necessary to self-government and territorial management" and there is a significant territorial component to tribal power. *Merrion v. Jicarilla Apache Tribe*, 450 U.S. 130, 141-142. *See also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) (significant geographic component to tribal sovereignty).

A tribe also retains its well-established power to exclude non-members from tribal land, including "the lesser power to place conditions on entry, on continued presence, or on reservation conduct." *Merrion*, 455 U.S. at 144. Thus, a tribe can regulate the conduct of persons over whom it could "assert a landowner's right to occupy

¹ EPA has not resolved whether it is necessary to analyze under the *Montana* test the impacts of nonmember activities on tribal/trust lands, such as those covered in this Application, to find that a tribe has inherent authority to set water quality standards for such areas. EPA believes, however, that, as explained in this Decision Document, the Tribe could show authority over nonmember activities on tribal/trust lands covered by the Application under the *Montana* "impacts" test.

and exclude.” *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651-652 (2001), quoting *Strate*, 520 U.S. at 456.

The Application describes in detail the importance of surface water quality to the Swinomish Indian Tribal Community and the many ways the Tribe and its members use surface waters. Maps provided by the Swinomish Indian Tribal Community show all the waters within the Reservation. Uses of the water by the Tribe and its members that the Tribe seeks to protect include subsistence, ceremonial, and commercial fishing and shellfish harvesting, wildlife habitat, recreation in and on the water, and cultural uses and domestic uses. The Tribe has asserted that impairment of such water on the Reservation would have a serious and substantial effect on the political integrity, economic security, or health or welfare of the Swinomish Indian Tribal Community and its members.

The Application describes the topography of the Reservation, which creates surface water drainage patterns where waters flow freely from lands owned by the Tribe or Tribal members to nonmember-owned land or from nonmember to Tribal land. Virtually all of the water that falls onto or passes through the Swinomish Reservation either discharges to the resource-rich tidelands and/or estuaries of the Swinomish Indian Tribal Community, and/or contributes to the recharge of aquifers that supply drinking water to residents of the Reservation. Storm water from both member and nonmember lands is generally combined in outfalls that discharge to tidelands, due to the interspersed pattern of land ownership within the Reservation boundaries.

As explained more fully below and described in Appendix I, the Tribe supported its claims with information about how it and its members use the waters and with information showing how current and potential nonmember activities on the Reservation have or may have serious and substantial direct effects on the Tribe’s political integrity, economic security, and health and welfare.

The First Supplemental Submission describes in detail the leasing of trust lands within the Reservation to nonmembers for a variety of purposes, including industrial, commercial, agricultural, residential and recreational purposes. Those activities generally have similar effects on the Tribe and its members when carried out on trust lands that they have when carried out on nonmember fee lands. Approximately 970 acres of the 4,610 acres of upland trust lands (21%) are leased to nonmembers. See Map 3, Swinomish Indian Reservation – Leased Areas and Tribal Enterprises (2007), Exhibit 8 to First Supplemental Submission. For the most part, nonmember activities on trust lands within the Reservation are authorized by the Tribe or a member of the Tribe through lease arrangements governed by 25 U.S.C. § 415 and BIA regulations at 25 C.F.R. Part 131. The leases specifically incorporate federal regulations at 25 C.F.R. Part 162 by reference. The presence of nonmembers on such lands within the Reservation is usually only by permission from the Tribe or a Tribal member, and the Tribe or Tribal member may exclude nonmembers from lands to which the Tribe or their members hold the fee or beneficial title.

The facts upon which EPA has relied in reviewing and making findings regarding the Tribe's assertion of authority to regulate the activities of nonmembers on the Reservation are presented in the Application, including the supplemental submissions, and Appendix I to this Decision Document. EPA also bases its findings and conclusions on its special expertise and practical experience regarding impacts to water quality and the importance of water quality management, recognizing that clean water may be crucial to the survival of the Tribe and its members. Based on the information summarized in Appendix I, EPA makes several findings, as described below.

EPA finds that the Tribe has shown the Tribe and its members make use of the Reservation waters for a number of purposes, including commercial fishing and shellfish harvesting, wildlife habitat, recreation in and on the water, domestic uses, and subsistence, ceremonial, and cultural uses. We find that each of those uses is important to the Tribe and that regulating water quality is important to protecting the uses. EPA further finds that the Reservation's characteristics are such that various human activities occur or may occur on the Reservation, that if not properly regulated, can seriously impair the quality of water resources within or surrounding the Reservation that the Tribe and its members use and rely upon for a variety of purposes, thereby seriously affecting the Tribe and members of the Tribe.

EPA also cites and relies on information regarding nonmember presence and activities on the Reservation including private residences and commercial businesses provided in the Findings of Fact. For example, Appendix I describes actual or potential water quality impacts from the following: residential septic systems; forestry; recreational activities; agriculture, including the use of herbicides and pesticides; and disposal of industrial wastes. The actual or potential impacts from these nonmember activities could affect Tribal interests through releases of contaminants such as household chemicals, household cleansers, solvents, heating oil, fertilizer, herbicides, insecticides, septage, coliform and noncoliform bacteria, and effluents from former waste disposal sites.

Based on the preceding findings, and additional findings and information described more fully in Appendix I, EPA concludes that existing and potential future nonmember activities within the Reservation have or may have direct effects on the political integrity, economic security and health or welfare of the Tribe that are serious and substantial.

Thus, the Agency has determined that the Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(ii) by providing a statement by the Tribe's legal counsel that describes the basis for the Tribe's assertion of authority over surface waters within the borders of the Reservation. Based on that determination and the previously stated findings, EPA finds that the Tribe has met the requirement set forth at 40 C.F.R. § 131.8(a)(3) and (b)(3).

D. Capability.

To demonstrate that a tribe has the capability to administer an effective water quality standards program, 40 C.F.R. § 131.8(b)(4) requires that the tribe's application

include a narrative statement of the tribe's capability. The narrative statement should include: (i) a description of the tribe's previous management experience, which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act, the Indian Mineral Development Act or the Indian Sanitation Facility Construction Activity Act; (ii) a list of existing environmental and public health programs administered by the tribal governing body and copies of related tribal laws, policies and regulations; (iii) a description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government; (iv) a description of the existing, or proposed, agency of the tribe that will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards; and (v) a description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan that proposes how the tribe will acquire additional administrative and technical expertise. 40 C.F.R. § 131.8(b)(4)(i)-(v).


The Tribe's Application shows that it is reasonably expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the CWA and applicable regulations. A memo prepared by Sally Brough, the Tribal Water Quality Standards Coordinator for Reg. 10, dated March 18, 2008, explains a number of reasons for finding that the Tribe is capable of administering a water quality standards program and a water quality certification program. Ms. Brough based her conclusion on her review of the TAS Application, including the supplemental submissions, and her work with the Tribe's staff in the development of draft water quality standards. In addition, Ms. Brough considered a memo prepared by Diana Boquist, Tribal Coordinator for Reg. 10, dated February 13, 2008, in which Ms. Boquist concludes the Tribe is capable of this work based on her experience with managing financial assistance grants to the Tribe and the knowledge she has developed about the Tribe and its successful administration of a number of federal programs. Ms. Brough reviewed in detail the environmental and public health programs administered by the Tribe, and described in detail the Tribe's Water Resources Program and her working knowledge of the Tribe's staff working on water quality matters. In summary, Ms. Brough believes that the extensive experience of the Tribe demonstrates it is capable of implementing a water quality standards program and issuing water quality certification pursuant to Section 401 of the CWA.

The Tribe has satisfied the requirements to 40 C.F.R. § 131.8(b)(4) by providing information that describes its capability to administer an effective water quality standards and certification program, and EPA has determined that the Tribe has met the requirements of 40 C.F.R. § 131.8(a)(4).

III. Conclusion

EPA has determined that the Swinomish Indian Tribal Community has met the requirements of CWA Section 518(e) and 40 C.F.R. § 131.8 and therefore approves the Tribe's Application for TAS to administer the water quality standards program pursuant

to CWA Sections 518(e) and 303(c). Pursuant to 40 C.F.R. § 131.4(c), the Tribe is also eligible to the same extent as a state for the purpose of certification under CWA Section 401.




Elin D. Miller
Regional Administrator

4/18/08

Date

III. Conclusion

EPA has determined that the Swinomish Indian Tribal Community has met the requirements of CWA Section 518(e) and 40 C.F.R. § 131.8 and therefore approves the Tribe's Application for TAS to administer the water quality standards program pursuant to CWA Sections 518(e) and 303(c). Pursuant to 40 C.F.R. § 131.4(c), the Tribe is also eligible to the same extent as a state for the purpose of certification under CWA Section 401.



Elin D. Miller
Regional Administrator

4/18/08

Date

b5 deliberative process



APPENDIX I SWINOMISH INDIAN TRIBAL COMMUNITY FINDINGS OF FACT

I. Introduction

This document contains factual findings upon which the United States Environmental Protection Agency (EPA) is relying in making a decision regarding the Swinomish Indian Tribal Community (Tribe or SITC) Application for treatment in a similar manner as a state (TAS) under Section 518(e) of the Clean Water Act (CWA) for purposes of establishing water quality standards and issuing water quality certifications under CWA Sections 303 and 401. The TAS determination is a separate process from EPA's decision to approve or disapprove a tribe's water quality standards.

The Tribe has made three submissions that comprise its TAS Application. The TAS Application initially was submitted by a June 14, 2006 letter from Ann E. Tweedy, Tribal Attorney, to L. Michael Bogert, EPA Regional Administrator, and included Exhibits 1-29 (Initial Application). The Tribe supplemented its TAS Application with a June 28, 2007 letter from Emily R. Hutchinson, Tribal Attorney, to Richard McAllister, EPA Region 10 Assistant Regional Counsel, "Supplemental Submissions in Support of Swinomish TAS Application", with Exhibits 1-37 (First Supplemental Submission). In response to comments by the Washington Department of Ecology, the Tribe submitted additional supplemental materials in a February 20, 2008 letter from Emily R. Hutchinson, Tribal Attorney, to Richard McAllister, EPA Region 10 Assistant Regional Counsel, "Second Supplemental Submissions in Support of Swinomish TAS Application," with Exhibits 1-26 (Second Supplemental Submission). Together, these three submissions comprise the SITC TAS Application (Application).

The SITC's Application describes features of and activities on the Swinomish Indian Reservation (Reservation). The Reservation, located in the State of Washington north of Seattle, consists of approximately 10,450 acres of land, of which 7,450 acres are uplands and approximately 3,000 acres are tidelands. For purposes of this Application, the Reservation boundary extends to the historical midpoint of the Swinomish Slough (Slough), to the extreme low water tide mark of the southern and western waters surrounding the Reservation, and to a line that trends east from the extreme low water mark of Turner's Bay, then heads north to the extreme low water mark of Padilla Bay. A majority of the Reservation land (seventy-four percent) is owned (1) by the United States and held in trust for the Tribe, (2) by the Tribe and held in fee, or (3) by the United States and held in trust for Tribal members (collectively Tribal lands). The remaining Reservation land is owned in fee by nonmembers of the Tribe.

The Tribe's Application describes in detail the importance of surface water quality to the SITC and its members, and the many ways the Tribe and its members use surface waters. Maps provided by the Tribe show many features of the Reservation, including patterns of land ownership, rights-of-way and easements, surface water bodies, water quality monitoring stations, topography, and land use in accordance with the SITC zoning ordinance.

These Findings of Fact contain information relevant to whether the Tribe can demonstrate that it has inherent authority over nonmember activities on the Reservation affecting water quality. The EPA assesses Tribal authority based upon the actual or potential future impacts of such nonmember activities on the Tribe. Thus, the first section of the Findings of Fact describes the *Montana* "impacts" test EPA uses to assess Tribal authority, and the Clean Water Act functions the Tribe is proposing to carry out. The remaining sections contain factual information regarding actual and potential nonmember activities on the Reservation, and how the impacts of those activities on Reservation water resources do or may affect the Tribe.

This Findings of Fact document supports the Agency's decision to approve the Tribe's Application. The SITC asserts that it has authority to set water quality standards and issue certifications for all waters within the Reservation boundaries. The Agency analyzes a tribe's inherent authority over activities of nonmembers under the test established in *Montana v. United States*, 450 U.S. 544 (1981) (*Montana* test). This document sets forth the Findings of Fact that EPA believes are relevant for our determination regarding the Tribe's assertion of inherent authority to regulate nonmember activities under the *Montana* test (as described in the attached Decision Document) for purposes of the Clean Water Act water quality standards and water quality certification programs. This document discusses nonmember activities on the Reservation, including Tribal lands.

II. Impacts of Actual and Potential Future Activities within the Reservation's Exterior Boundaries on the Political Integrity, Economic Security, and Health or Welfare of the Tribe and its Members

A. Reservation Water Resources

This section presents information on the relationship between nonmember activities within the exterior boundaries of the Reservation and impairment of water quality and beneficial uses of water resources by the Tribe and its members. The facts summarized below from the files of the EPA and from materials submitted by the Tribe are organized to evaluate waters within the Reservation used by the Tribe or Tribal members (and the extent to which the Tribe or Tribal members could be subject to exposure to pollutants present in, or introduced into, those waters) and the waters of the Reservation subject to protection under the CWA. The Tribe has asserted that impairment of such waters on the Reservation would have a serious and substantial effect on the political integrity, economic security, or health or welfare of the Tribe and its members.

The Reservation was established in 1855 by the Treaty with the Duwamish, Suquamish, Etc., 1855, 12 Stat. 927, (Treaty), which was signed January 27, 1855, ratified by the U.S. Congress on March 8, 1859, and proclaimed by the U. S. President on April 11, 1859. *See* Treaty, attached as Exhibit 5 to the initial Application. Now known as the "Treaty of Point Elliott," this Treaty set aside SITC's reservation for the Tribe's exclusive use and occupation. Treaty of Point Elliott, Art. 2. Additionally, Article 5 of the Treaty confirmed SITC's fishing, hunting, and gathering rights. Treaty of Point Elliott, Art. 5. Specifically, the Treaty affirms the "right of taking fish at usual and accustomed grounds and stations . . . together with the privilege of hunting and gathering roots and berries on open and unclaimed lands."

The Reservation consists of all the uplands and submerged lands (lands that are permanently or periodically covered by water) within the exterior boundaries of the Reservation. These lands and adjacent water bodies are generally depicted in the map entitled "General Waterbodies on and around the Swinomish Indian Reservation", which is included as Exhibit 7 to the initial Application. For purposes of the TAS Application, the Reservation includes the Swinomish Channel to the historical midpoint of the Swinomish Slough and extends to the extreme low water mark of the south, west, and north sides of the reservation, which border waterways. *State v. Edwards*, 188 Wash. 467, 470-72, 62 P.2d 1094 (1936).

These exterior boundaries of the Reservation were established by the Treaty of Point Elliot. The Treaty Reservation is described as that part of Fidalgo Island east of a line running from Fidalgo Bay due south to Similk Bay. This boundary line corresponds to a marshy intertidal area that connected Fidalgo and Similk Bays at the time the Treaty was signed. Early maps also depict what is now McGlinn Island as a peninsula on the southeast end of Fidalgo Island, rather than as a separate island, and show that the main body of the Swinomish Slough was to the east of McGlinn Island and the causeway that now connects McGlinn Island to the Town of LaConner on the east side of the present-day Swinomish Channel. *See* Maps and Charts, attached as Exhibits 4 through 10 to the Second Supplemental Submission.

Subsequently, in 1873, President Grant diminished the boundaries of the Reservation by Executive Order on September 9, 1873. *See* Executive Order, attached as Exhibit 6 to the initial Application. The Executive Order moved the northern boundary of the Reservation east so as to exclude the peninsula of land now known as March's Point from within the exterior boundaries of the Reservation.

The Second Supplemental Submission describes how in the 1890s, the United States Army Corps of Engineers began surveying, dredging, diking, and straightening the Swinomish Slough to provide navigable access between Skagit and Padilla Bays at low tide. The Corps cut through lands at the north and south ends of the Slough, isolating on the eastern side of the present-day Swinomish Channel the two oxbows of land at the north end of the Swinomish Channel in Sections 12 and 13, T. 34N R. 2E WM and McGlinn Island and a majority of the

present-day causeway connecting McGlinn Island to the Town of LaConner. Although the oxbows of land at the north end of the Swinomish Channel have now passed out of Indian ownership, the lands were repeatedly surveyed as part of the Reservation, were allotted to Indians in 1885 or 1897, were recognized by the Corps to be Reservation lands prior to the cutting that isolated them from the Reservation, and are therefore within the Reservation boundaries. *See* Exhibits 20 through 26 to the Second Supplemental Submissions. Recently, SITC purchased property interests in McGlinn Island and the majority of the causeway connecting it to the Town of LaConner with funds from a federal appropriation. The Tribe has provided copies of the deeds and Bureau of Indian Affairs documents which show that those lands are held in trust for the Tribe, as well as correspondence from the Washington State Department of Natural Resources and the Skagit County Board of Commissioners recognizing those lands to be within the Reservation boundary. *See* Exhibits 12 through 19 to the Second Supplemental Submissions.

The boundaries of the Reservation extend at least as far as the historical midpoint of the Swinomish Slough (Slough),¹ to the extreme low water mark of the southern and western waters surrounding the Reservation, to a line that trends east from the extreme low water mark of Turners Bay, then north to the extreme low water mark of Padilla Bay. The Regulatory Boundaries Map, attached as Exhibit 7 to the Initial Application, provides a good general representation of the historical midpoint of the Slough and the extreme low water mark on the southern, western, and northern sides of the Reservation based on survey, photographic, and historical data from a variety of sources the Tribe has gathered. However, the actual Reservation boundaries may differ from those depicted in the Regulatory Boundaries Map because the extreme low water mark is not permanently fixed. The Reservation boundaries shown in the maps enclosed as Exhibit 7 to the Initial Application and other maps submitted by the Tribe in support of the Application comprise the area over which the Tribe is asserting authority to establish CWA water quality standards under CWA Section 303(c), 33 U.S.C. § 1313(c), and CWA Section 401, 33 U.S.C. § 1341..

The major surface waters within the Reservation regulatory boundaries are:

1. Padilla Bay
2. Padilla Bay Lagoon
3. Similk Bay
4. Turner's Bay
5. Kiket Bay
6. Lone Tree Lagoon

¹ Although the Tribe believes that the Reservation boundaries extend farther than those described herein, it is asserting regulatory authority, for TAS purposes, only to the historical midpoint of the Slough.

7. Lone Tree Creek
8. Skagit Bay
9. Skagit River Delta
10. Snee-Oosh Creek
11. Swinomish Channel
12. Munks Creek
13. Fornsby Creek

The topography of the Reservation creates surface water drainage patterns where waters flow freely from lands owned by the Tribe or Tribal members to nonmember-owned land or from nonmember-owned land to Tribal lands. See Topography of the Swinomish Reservation, Exhibit 31 to the First Supplemental Submission. Virtually all of the water that falls onto or passes through the Reservation either flows down hill to the resource-rich tidelands and/or estuaries of the Swinomish Reservation, and/or contributes to aquifer recharge. A report prepared by the United States Geological Survey, "Reconnaissance Hydrogeology and Water Quality of the Swinomish Indian Reservation, Skagit County, Washington, Water Resources Investigation Report 96-4031 (1998), Exhibit 32 to the First Supplemental Submission, describes the ground water within the Reservation as discharging into adjacent salt-water bays and sea-level marshes and mudflats. The Report also describes how precipitation is the source of recharge to the ground water reservoir, which is a drinking water and public water supply source for the Tribe. Storm water from both Tribally-owned and nonmember lands is generally combined in outfalls that discharge to tidelands, due to the interspersed pattern of land ownership within the Reservation boundaries. As described below and detailed in the Initial Application, because nonmember fee parcels or leased parcels are primarily located along the shoreline and Reservation water bodies, the activities on nonmember fee or leased parcels have or may have a disproportionate effect on the environmental qualities of tidelands, water bodies, and groundwater aquifers because of the proximity and concentration of their parcels, and due to the topography and drainage/recharge patterns of the Reservation.

B. Role of Functions Authorized under the Clean Water Act in Protecting the Tribe's Ability to Use and Benefit from its Water Resources

This section contains information about nonmember activities that may affect water quality based upon the actual or potential impacts of nonmember activities. It begins by addressing how the Clean Water Act water quality management functions that the Tribe proposes to carry out can protect uses of Tribal waters and summarizing why the Tribe believes it is important to carry out those functions. It then describes how, if unregulated, activities like those that take place on the Reservation can cause water quality degradation. The next section discusses specific examples of nonmember activities currently taking place on the Reservation,

on both Tribal and nonmember land, to illustrate how those actual and potential nonmember activities affect or may affect the Tribe. The information considered in these Findings of Fact is drawn from the Application, supplemental materials, and the court decisions cited.

1. Clean Water Act Water Resource Protection

The Clean Water Act and subsequent amendments call for the maintenance and restoration of the physical, chemical and biological integrity of waters of the United States. Water quality standards are provisions of federal, state, or tribal law that consist of designated and existing uses, water quality criteria to protect those uses, an antidegradation policy, and other general policies that affect the implementation of the standards, such as mixing zone and variance policies. Water quality standards serve the dual function[s?] of establishing water quality goals for specific water bodies and serving as the regulatory basis for water quality-based treatment controls and strategies. The objective of the Act, maintenance and restoration of the integrity of the nation's waters, is directly related to water quality standards that are intended to ensure the full protection of all existing uses and designated uses identified by states and tribes.

Tribal water quality standards are intended to protect the beneficial uses and water quality of reservation waters. In addition to designated uses and criteria, water quality standards include antidegradation provisions that protect all existing uses of surface waters regardless of whether such uses are actually designated in water quality standards. Antidegradation requirements also serve to maintain and protect high quality waters and waters that constitute an outstanding national resource. Further, antidegradation requirements can be utilized by tribes and states to maintain and protect the quality of surface waters that provide unique cultural or ceremonial uses.

In the First Supplemental Submission, the Tribe summarizes the Application as showing degradation of water quality within the Reservation that has caused serious and substantial harm to the political integrity, economic security, and health and welfare of the Tribe and its members by damaging fisheries resources, contaminating and forcing closures of certain surface waters vitally important to the Tribe and its members for subsistence fishing and cultural purposes, and reducing the quantity and quality of drinking water sources. The First Supplemental Submission also provides detailed descriptions of other actual or potential effects of nonmember activities on Reservation water quality and, therefore, on the Tribe and its members. The Tribe specifically emphasizes that water quality degradation:

- Interferes with the Tribe's and Tribal members' treaty right[s?] to engage in subsistence, ceremonial, and commercial fishing and shellfishing within the Reservation;
- Threatens the health of Tribal members by decreasing the safety of food sources that have been historically and are currently essential to the diets of Tribal members. The First Supplemental Submission includes a recent study conducted by the Tribe under an EPA grant, which concludes that Tribal members consume significantly more fish and

shellfish than nonmembers, and that bioaccumulated toxics in subsistence-harvested shellfish gathered on and around the Reservation pose a substantial risk to the health of Tribal members. See "Bioaccumulative Toxics in Subsistence-Harvested Shellfish: Contaminant Results and Risk Assessment" (2006), Exhibit 36 to the First Supplemental Submission;

- Reduces the availability of fish and shellfish for culturally and spiritually important ceremonial purposes;
- Interferes with the Tribe's ability to perform the essential governmental function of providing safe public water supplies within the Reservation;
- Decreases the quantity and quality of water available to satisfy Tribal members' daily needs;
- Decreases the amount of income from fishing and shellfishing the Tribe and its members can generate;
- Decreases the amount of revenues the Tribe can collect from levying taxes upon the sale of fish and shellfish because the quantity of those food stocks is diminished;
- Increases the risk that Tribal members will suffer disability, disease, and death caused by exposure to contaminated drinking water from Reservation aquifers and streams; and
- Threatens the health of Tribal members who have physical contact with, or accidentally swallow, contaminated water during fishing, shellfishing, cultural, and recreational activities on Reservation waters.

2. The Importance of Protecting Fish and Shellfish

The Tribe and its members use Tribal waters for fishing and shellfish harvesting and are heavily dependent on fisheries resources, especially native salmonids and various species of shellfish. The Reservation is surrounded by substantial marine and estuary resources that are used and relied on by the Tribe and its members. Protecting water quality can prevent or limit water quality-degrading activities that harm fish and shellfish that live in Tribal waters or that have an adverse effect on the habitat upon which the fish and shellfish depend. Activities that degrade water quality and threaten or harm fisheries resources can cause serious and substantial harm to the political integrity, economic security, and health or welfare of the Tribe and its members by threatening food sources and sources of income and tax revenue; undermining the effectiveness of significant expenditures by the Tribe for the purpose of natural resource protection, habitat restoration, and fish and shellfish management; and reducing the availability of fish and shellfish for culturally and spiritually important ceremonial purposes.

The Initial Application states that up to seventy percent of the Swinomish Tribe's subsistence traditionally came from fish and shellfish. Ruby, Robert H. and Brown, John A., *A Guide to the Indian Tribes of the Pacific Northwest* 230-31 (1986). Although the diets of Tribal members have become much more diverse during the past century and a half, salmon and, to a lesser extent, shellfish are still nutritionally and culturally central to the Tribe. The Tribe has

treaty rights to fish and shellfish, and consumes both types of fish in greater quantities than the public at large.

Fish and shellfish are also important economically. The Tribe's Chairman, Brian Cladoosby, and several other Tribal Senators are employed as professional fishers, as are numerous other tribal members. The Tribe issues approximately 450 licenses per year for salmon fishing, halibut fishing, and various types of shell fishing, and issues an additional fifty or more licenses per year for hunting. In 2006, fishing and shellfishing brought in a total of \$3,531,314.47 to the Tribe and Tribal members, compared with \$2.9 million in 2004 and \$3.1 million in 2005. See Swinomish Catch Summary Revenue (2006), Exhibit 33 to First Supplemental Submission; Fish Management Swinomish Tribal Community 2005 Report, Exhibit 8 to the Initial Application; Swinomish Fisheries Annual Report, Exhibit 9 to the Initial Application. The Tribe also derives revenue from taxing the sale of fish and shellfish. Fish and shellfish are important culturally, spiritually, and for ceremonial purposes. A tradition of the SITC is to serve smoked salmon at virtually every Tribe-sponsored dinner, and Dungeness crab is also served whenever it is in season.

Water quality management protects fish and other aquatic life, and ensures the health and safety of Tribal members who use the fish or shellfish as a food source. A study of shellfish contamination conducted by the SITC with funding from an EPA grant is reported in "Bioaccumulative Toxics in Subsistence-Harvested Shellfish: Contaminant Results and Risk Assessment" (2006), Exhibit 36 to the First Supplemental Submission. That Report identified a number of potential sources that contribute to the contamination of shellfish resources gathered by members of the Tribe, and concluded that members of the Tribe consume significantly greater quantities of fish and shellfish than nonmembers and that bioaccumulated toxics in shellfish gathered on and around the Reservation pose a substantial risk to the health of Tribal members. Since the Tribe and its members use and rely on shellfish to achieve the Tribe's economic, subsistence (food), ceremonial/cultural, aesthetic and educational/scientific goals, identifying and controlling potential sources of contamination is necessary. Fully protecting aquatic life use also helps ensure the economic well-being of both the Tribe and its members who harvest fish and other aquatic life, or who rely economically on water-based recreation businesses.

Fish and shellfish resources are important to the economy of the Tribe and its members. That economic importance arises from the income to the Tribe and its members from the sale of fish, from the value of the fish they eat, and from revenue the Tribe derives from taxing the sale of fish and shellfish. The average income among members of the Swinomish Tribe, like those of many tribes, is well below the average income of nonmembers in Skagit County, which is adjacent to the Reservation, and other nearby areas. In 1993, economist Phillip Meyer estimated that permitting tribes collectively to take a fifty percent share of shellfish, as was subsequently allowed, *United States v. Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994), *aff'd in part and rev'd in part*, 157 F.3d 630 (9th Cir. 1998), would raise the Tribal per capita annual income by over \$2,000, which equated to an average increase in income of over thirty percent. Exhibit 10

to the Initial Application at p. 30; *see also* Excerpt adapted from Meyer Resources, Inc., 1997: "Northwest Tribal Values on the Land: A Study of Values that Northwest Tribes Associate with Streams, and with Associated Land Areas in Watersheds. A Report to the Northwest Indian Fisheries Commission, Olympia, WA," attached as Exhibit 12 to the Initial Application.

A 2005 report by Mr. Meyer indicates that thirty-six percent of Swinomish members live in poverty (compared to eleven percent of Washington State residents). *See* Philip A. Meyer, "A Review of Two Documents from the Washington Department of Ecology" (March 15, 2005), at 5, attached as Exhibit 13 to the Initial Application. This figure is corroborated by a 2001 Bureau of Indian Affairs unemployment statistic for the Tribe that shows nearly 42% of those 16 or older on the Reservation are unemployed. *See* Letter from DSHS, attached as Exhibit 14 to the Initial Application. This information shows the economic importance of the Reservation fish and shellfish resources to the Tribe and its members. A loss of these resources to the Tribe and its members, valued at approximately \$3,530,000 for 2006, would have significant adverse affects to both individual tribal member income and tribal governmental services funded in part from revenues derived from the levying of taxes upon the sale of fish and shellfish.

3. The Importance of Protecting Water Resources that Serve as Wildlife Habitat

The Application, in addition to explaining the role of Reservation waters in protecting the ability of the Tribe and its members to catch fish and shellfish for commercial, subsistence, and ceremonial purposes, also describes the many other uses the Tribe makes of Reservation waters. Those uses include habitat for plants and wildlife, swimming and hunting, a source of drinking water, and spiritual and cultural purposes, including spiritual bathing. The Initial Application includes a chart at p. 45 that describes the cultural, economic, and environmental importance of each of the water bodies on the Reservation.

Water quality management protects wildlife and habitat by helping ensure that birds, mammals, reptiles, and amphibians, and plant species and flora that use and depend upon Reservation waters as a source of water, food, and/or habitat will maintain the species diversity and productivity that the Reservation lands and waters are capable of supporting. Protection of beneficial wildlife use protects the biota that use Reservation waters, including threatened and endangered species (e.g., bald eagle, Chinook salmon, bull trout, and steelhead). This protection enables the Tribe to achieve its fisheries, cultural, recreational, scientific, educational, and economic goals, and enhances the Tribe's long-term economic security by preserving the value of wildlife resources. The Tribe, moreover, has treaty rights to hunt and fish, and protection of wildlife and habitat enhances and protects those rights. Finally, protecting wildlife safeguards Tribal members and nonmembers from ingesting toxins that may accumulate in the tissues of wildlife.

4. How Protecting Reservation Waters Protects Water Resources and Wildlife Important to the Tribe and Tribal Members

The Application provides a detailed description of the specific Reservation water resources, the wildlife that depend upon those resources, and how the Tribe and its members utilize those resources.

Padilla Bay. The Padilla Bay ecosystem is unique and vital to ensuring salmonid fisheries survival and abundance and the health of numerous other important species. In addition to providing important food sources for many aquatic and wildlife species, the ecosystem also provides breeding areas for two endangered species, bald eagle and peregrine falcon, which are located within the surrounding watershed. A heron rookery, brandt graveling area, and seagull rookery are also located in the watershed at the edge of the Swinomish Reservation. The Tribe has traditionally used Padilla Bay for fishing of salmon, hunting of birds, and harvesting of shellfish, especially crabs. A large area of the non-Reservation portion of Padilla Bay has been set aside as a National Estuarine Research Reserve.

Similk Bay and Turners Bay. Shorelines in Similk Bay have been designated as shorelines of statewide significance by the State of Washington. Turners and Similk Bays are environmentally sensitive due to the abundant wildlife and aquatic life that rely on them as habitat for spawning, feeding and refuge. Both bays offer spawning habitat for herring with eelgrass beds that extend well up into the tidal drainage channel of Turners Bay. The salt marshes and freshwater wetlands of Turners Bay also provide important habitat for juvenile salmonids, including coho salmon that have been found in the upper bay (Wyman, unpublished field report, 1996). The sand and gravel shores host spawning habitat for smelt and sand lance (Penttila, WDFW, 2000). The Application notes that these waters have been heavily utilized for subsistence shellfish harvesting, and that tidal fish traps and other methods are used to catch salmon, smelt, herring and steelhead. The shellfish resources include littleneck and manila clams, which are significant species to the subsistence harvest of the Swinomish Community. Eagles, herons and other waterfowl frequent the shallow waters of these bays to feed and seek refuge, as do harbor seals and fish, and Tribal members hunt duck in these areas.

Kiket Bay and Lone Tree Lagoon. Kiket Bay is a broad, 36-meter deep basin semi-enclosed by barrier islands and bedrock reefs. Hope Island and the reefs extending between Lone Tree Point and Hope Island mark the southern boundary of the bay, while Kiket Island and Skagit Island mark the northern boundary. An arm of rock extending from Lone Tree Point encloses a small estuarine salt marsh to the north, known as the Lone Tree Creek Lagoon that drains completely or nearly completely at low tide. The Application describes bull kelp forests and small eelgrass beds growing in the subtidal zone immediately off Lone Tree Point. Shellfish, salmon, seals, crabs and other marine life are found there, as are numerous other bird and wildlife species including bald eagles, herons, osprey, deer, red foxes, bobcats, elk, and many other small mammals. Juvenile salmonids make use of the shoreline all around the bays.

Historically, and continuing to the present, Lone Tree Point has been the site of a culturally valuable traditional Tribal beach seining operation to catch salmon including pink, humpies, and coho, which continues currently. Kiket Bay has also been utilized for subsistence shellfish harvesting, and salmon, smelt, herring, and steelhead fishing. Tribal members also utilize the beaches at Lone Tree Point for subsistence and ceremonial fishing, crabbing, and shellfish harvesting and family and Tribal recreational activities.

Skagit Bay and the Skagit River Delta. Shorelines in Skagit Bay have been designated as shorelines of statewide significance by the State of Washington. These waters are environmentally sensitive due to the abundant wildlife and aquatic life that rely on this habitat for feeding and refuge. Smelt and sandlance spawn along the Snee-Oosh shoreline. Eagles and heron and other waterfowl frequent the shallow waters of Skagit Bay to feed and seek refuge, as do harbor seals and fish. The salt marsh and mudflat ecosystem within Skagit Bay is important to ensure salmonid fisheries survival and abundance. These wetlands also serve to improve water quality. The waters of the Skagit River Delta are environmentally sensitive due to the abundant wildlife and aquatic life that rely on this habitat for feeding and refuge, especially juvenile and adult salmonids, eagles, waterfowl, and nesting seagulls. The wetland is host to a diverse community of birds, waterfowl, and other wildlife. Eagles frequently hunt in the area and nest nearby. A seagull rookery is located on one of the grass islands. Juvenile salmonids migrating out of the Skagit River system also utilize the wetland's rich habitat. Aquatic plants also grow throughout the wetland. The wetland system itself also serves important water quality and hydrologic functions. Historically, Skagit Bay was the site of a community salmon fishing camp and a Tribal fish trap. Currently, Tribal members use the waters of Skagit Bay and the Skagit River delta for subsistence and commercial fishing and shellfishing, duck hunting, and swimming.

Swinomish Channel. The waters of the Swinomish Channel are important to members of the Tribe and to the abundant wildlife and aquatic life that rely on this habitat for feeding and refuge. Tribal Community members use the Channel for fishing, swimming, crabbing, hunting, boat moorage, and navigation. The lowlands along the north part of the channel are home to numerous migrating birds and waterfowl following the Pacific Flyway. Eagles and herons and other waterfowl frequent the shallow waters of these bays to feed and seek refuge, as do harbor seals and fish. Sea otters, seals, peregrine falcons, cormorants, kingfishers and other wildlife also make use of the area. Extensive networks of wetlands in the lowlands off the shore provide shelter and food for the birds. The salt marshes provide important habitat for juvenile salmonids. These wetlands also serve to improve water quality. The shorelines of the Swinomish Channel have been designated as shorelines of statewide significance by the State of Washington.

C. Potential Effects of Unregulated Human Activities on Tribal Resources

Twenty-six percent or almost 2,700 acres of Reservation land is held in fee by non-members. Much of that land is currently classified as rural residential. Other current fee land zoning classifications include forestry, agriculture, and urban residential. Additionally, several non-tribal businesses are located on leased Tribal trust land, including a log yard and towing operations conducted by barge in the Swinomish Channel, a fish processing plant, a boatyard, and a campground and RV park. Many non-tribal residences are also located on trust land, including a gated residential community. Finally, a portion of trust land is leased by nonmembers for agricultural use, including the cultivation of row crops. As shown below, activities by non-members on both trust and fee lands have the potential to directly affect the Tribe's political integrity, economic security, or health and welfare.

Agricultural and forestry practices may potentially cause increases in water turbidity and deposition of fine sediments in streams, rivers, and tidelands that may adversely impact water bodies in many ways. Turbidity and fine sediments can negatively affect aquatic life in Tribal waters by reducing photosynthesis of plant life, interfering with the ability of fish to sight-feed, smothering fish eggs and insect life, and reducing the habitat available for food organisms and spawning of fish.

Increased turbidity and sediment deposition can also result in a lower growth rate of fish from loss of food resources and/or elimination or significant reduction of spawning success in streams. Fish populations may decline in the streams, rivers and tidelands to which they are tributaries.

Diversion of surface water for agricultural or other uses that is returned to surface water bodies after use can result in harmful effects on water quality and the integrity of aquatic communities by increasing stream temperatures and by the loss of physical habitat for fish and other aquatic life. Increased stream temperatures may exceed levels necessary for optimum growth, cause direct mortality, or prevent successful spawning and survival of cold water fish such as salmon and bull trout.

Agricultural runoff, carrying constituents from fertilizers, insecticides, herbicides, and fungicides, is a significant source of water quality degradation nationwide. Increases in loading of nutrients (primarily nitrogen and phosphorus compounds) can result from both precipitation and irrigation. These nutrients can stimulate undesirable increased growth of vegetation in water bodies. High concentrations of phytoplankton (microscopic plants) or larger plants are known to result in undesirable changes in water quality on a daily or seasonal basis. For example, excessive vegetation may result in very low levels of dissolved oxygen during dark hours when photosynthesis does not occur but respiration continues. Stimulation of plant growth from excessive nutrients may result in low dissolved oxygen and fish kills.

Increases in loadings of ammonia, chlorine, and oxygen-demanding (biochemical oxygen-demand, or BOD) substances may result from improper operation or accidents occurring at on-site septage disposal facilities that discharge into Tribal waters. Because rather small shifts in pH and temperature can significantly increase the toxicity of ammonia, effects of discharges on the growth and survival of aquatic life may occur downstream from discharges.

Ammonia and its breakdown products may also serve as nutrients for excessive plant growth and as sources of oxygen demand, which can lower oxygen levels in Tribal waters. Chlorine has direct toxicity to aquatic life at very low levels and may directly affect the growth, reproduction and survival of aquatic life. Increases in BOD loading can result in reduced oxygen levels, which affect aquatic life survival, growth, and productivity.

Herbicides and pesticides used for agriculture, forestry and residences can be transported to surface and ground waters by precipitation and run-off or through irrigation. Depending on the concentrations, this may cause direct mortality or reduction of growth and reproduction in fish and invertebrates. Tribal members may also face increased health risks from exposure to herbicides and pesticides present in fish flesh or drinking water taken from Tribal water bodies or from ingestion of wildlife that feed upon aquatic plants or animals in Tribal water bodies. Studies have found elevated levels of herbicide and pesticide levels in agricultural areas around the United States.

D. Examples of Impacts of Nonmember Activities that May Impair or Have the Potential to Impair Water Quality and Beneficial Uses of the Tribe's Waters

The Tribe asserts that contamination of the surface water resources on the Reservation has a direct, serious and substantial effect on the political integrity, economic security, or health, or welfare of the Tribe. In its Initial Application and First Supplemental Submission, the Tribe provided information regarding actual or potential Reservation activities that degrade water quality. Those activities harm the Tribe by damaging the fisheries, contaminating and forcing closures of certain surface waters, and reducing the safety of drinking water sources.

The following discussion provides examples of how current nonmember activities on Tribal lands and nonmember-owned fee lands within the Reservation affect Reservation water quality.

1. Residential Land within the Swinomish Reservation

Residential activities on nonmember-owned lands could potentially impact Tribal interests through releases of contaminants such as household chemicals, household cleansers, solvents, heating oil, fertilizer, herbicides, insecticides, septage, coliform and noncoliform bacteria, and effluents from hobby farms. A large percentage of non-member fee lands are located along Reservation shorelines, immediately adjacent to tidelands held in trust for the Tribe

and to water bodies surrounding the Reservation, including the Swinomish Channel, Similk Bay, Kiket Bay, and Skagit Bay. Urban residential use increases impervious surfaces, thereby increasing run-off and the likelihood that damaging materials will enter watercourses. These runoff pollutants include the nutrients derived from fertilizers, automotive wastes, failing septic systems, and other sources. Because fresh water will generally "float" over denser seawater before gradually mixing with the seawater, species that reproduce, live, or feed in the inter-tidal zone or in the upper portion of the water column are particularly vulnerable to contaminated freshwater input. Thus, collectively, residential land use causes increases in temperature, turbidity, quantity of water in the streams during rainy periods (due to increased run-off), and toxics, and decreases of dissolved oxygen.

The effects of failing septic tanks associated with residential use have been documented at Similk and Turners Bays, where shellfishing areas have been closed at times due to fecal coliform levels that exceed Washington Department of Health safe levels. All of the Reservation land adjoining Turner's Bay is residential fee land, and along Similk Bay within the Reservation, approximately two-fifths of it is individual trust land and three-fifths of it is fee land. About half of the uplands draining to Similk and Turners Bays are within the boundary of the Swinomish Indian Reservation. Increased bacterial levels are believed to be related to failure of septic systems on residential parcels along the Bays' shoreline both on- and off-reservation. In recent years, Skagit County and the Tribe have undertaken ongoing septic system repairs and upgrades, both on- and off-Reservation, to limit bacteria inputs into the bay.

Kiket Bay shoreline is more built-out than Similk and Turners Bays, with homes lining the shore north and south of Lone Tree Point. The homes have on-site septic systems and private or community wells. The uplands have had significant logging that also can impact the water quality of the bay. Water quality of Lone Tree Creek Lagoon is affected by contamination carried by Lone Tree Creek as a result of passing through a large recreational vehicle campground, as discussed further below.

Snee-Oosh Creek flows from a large forested wetland near the crest of the Reservation uplands and enters the bay at the northern edge of the mudflats. Non-point pollution in the Snee-Oosh Creek sub-watershed comes entirely from on-Reservation sources. Existing potential pollution sources include runoff from lawns, gardens, parks, and roads, as well as forest and construction practices. Increasing development and use of groundwater resources within the Snee-Oosh Creek watershed may be impacting groundwater base flow, which provides all of the creek flow during most of the summer. Low flows can cause fine substrate sediments to settle into interstitial spaces between gravels, impacting macroinvertebrate organisms and potential salmonid spawning habitat. Additionally, low flows create geomorphic conditions that can result in the evolution of low habitat complexity, which limits biotic diversity. Low flows also create shallow conditions that result in increased thermal warming (high temperatures) and associated low dissolved oxygen that can kill fish and other aquatic life. The sources of ongoing, sporadic fecal coliform contamination are unknown but may be related to failing septic systems, human and animal activity, or storm runoff. Dissolved oxygen is often measured at low levels during

summer months. Future increases in housing density may potentially introduce more of the same kinds of pollutants into Snee-Oosh Creek.

The Tribe enacted a Stormwater Management Code in 2004 to address the adverse impacts to surface waters that were occurring during the construction of residences and other buildings on the Reservation. The Supplemental Submission states that “stormwater run-off from nonmember construction activities often flowed in brown silt-laden rivulets directly onto tidelands or into fresh or marine waters within or surrounding the Reservation.” The Tribe’s Code now requires that any construction project adding 2000 square feet or more of impervious surface must obtain a stormwater permit from the Tribe, usually in connection with a building permit. The stormwater permits issued by the Tribe require control of run-off with a variety of methods, including silt fences, tarps over soil piles, stabilization of slopes, straw mulch, and bales. At larger construction sites, the permit may require construction of bioswales, settling ponds, and other treatment practices.

The First Supplemental Submission describes a number of examples of where non-member residences along the shorelines have created unauthorized shore defense works on adjacent tidelands, including bulkheads, revetments, and soft shore blocks. The “Nearshore Structure Survey of Swinomish Indian Reservation: Adapted Procedures and Preliminary Results” (2005), Exhibit 18 to the First Supplemental Submission, describes how non-members routinely place unauthorized structures on the tidelands that are held in trust, such as fill, decks, boathouses, stairs, piers, pilings, boat ramps, mooring buoys, and aquaculture equipment. Physical alteration of tidelands decreases the tideland area, storm berm and beach resiliency and stability, and the quantity and quality of fish, shellfish, and spawning habitat.

2. Agricultural Lands within the Swinomish Reservation.

As noted above, agricultural land use can cause a number of water quality problems. Like residential use, agricultural use results in increased chemical and nutrient application, which may cause eutrophication, which in turn results in decreased dissolved oxygen and increased temperature, turbidity, and toxics. Agricultural use also is associated with land disturbances, such as tilling and grading, which often increase run-off and/or infiltration, as well as the potential for chemicals to enter waterways and/or groundwater. Finally, certain agricultural uses, particularly hobby farms, result in the introduction of animal waste into streams and groundwater sources. This increases the bacteria and nutrient levels in the watercourses.

One area of the Reservation affected by agriculture is Fornsby Creek. The Fornsby Creek sub-basin drains an area of approximately 252 acres along the hilltop and east slope of the Reservation above the south end of the agricultural lands. When Fornsby Creek enters the agricultural flat lands, the stream channel is confined to diked agricultural ditches until it flows into the Swinomish Channel. Current potential sources of pollution within the lower reach are related to agricultural practices that may contribute nutrients, pesticides, herbicides, nuisance

algal growth due to nutrient loading, temperature degradation due to lack of riparian cover, low dissolved oxygen concentration due to high temperatures, and sediment loading. Fee lands within this sub-basin also overlie the recharge zone for groundwater aquifers. Temperatures are occasionally high and dissolved oxygen may be low during the summer months. Turbidity has been greater than expected 50% of the time. Fecal coliform was also occasionally high. Fornsby Creek is a drinking water source for one household. Recent water quality monitoring has identified high turbidity, low dissolved oxygen concentrations, and moderately high fecal coliform concentrations in the upper reach of Fornsby Creek relative to proposed water quality standards. Potential sources of pollution in the upper reach include failing residential septic systems, logging practices, residential gardening and yard care, and construction activities.

3. Forestry Lands within the Reservation

The SITC zoning map shows that the majority of uplands within the Reservation are zoned for forestry and open space. The Supplemental Submission provided information about the effects of both authorized and unauthorized harvesting of timber. Activities to establish and maintain forests for harvest use pesticides, herbicides and fertilizers, and precipitation can result in run-off of these chemicals into streams and creeks within the Reservation. The building of roads, which increase impervious surfaces, can cause increased run-off, change flow patterns of surface drainage, and increase the likelihood that contaminants will enter surface waters and ground water reservoirs. Tree removal also decreases the amount of precipitation that is absorbed, which also increases the amount of run-off and can cause erosion. Logging within the Reservation and the resulting run-off from logged areas contributes sediments to stream flow and contributes to high turbidity in the Swinomish Channel.

4. Disposal of Industrial Wastes

In 2002, EPA determined that a former disposal site for petroleum wastes located on nonmember-owned fee land on the Reservation was presenting an imminent and substantial endangerment to human health and the environment. The seven acre site was used from 1959 to 1970 to dispose in unlined "ponds" waste materials from the petroleum refineries in nearby Anacortes, Washington, including spent catalysts, effluent plant sludges, spent caustics, slop oil emulsion solids, separator sludge and other materials. In 1970, after wastes were no longer brought to the site, the disposal ponds were covered by wood and soil. In 1998, a site hazard assessment was completed by EPA's contractor, which issued a report entitled "PM Northwest Dump Site Phase 2 Integrated Site Assessment Report," TDD 98-02-0016, August 1999 (the "Phase 2 SI Report"):

"Results of the [investigation] indicate that organic and inorganic contaminants appear to be migrating from the site." [] "Two hundred and thirteen drinking water wells are located within a 4-mile radius of the Site. The Skagit County Public Utilities District has

two formerly-used wells located approximately 0.8 miles north of the Site, and two public drinking water wells operated by the Swinomish Utility and Environmental Services Authority are located between 1 and 2 miles of the Site.”

Groundwater samples collected from monitoring wells at the site detected a number of hazardous substances. The site was located on a bluff above the Swinomish Channel, with wetlands below the bluff, and sampling of surface water and sediments in the wetlands detected a number of hazardous substances.

In an administrative order on consent issued pursuant to section 106 of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) by EPA to P.M. Northwest to conduct an emergency removal action, EPA Docket No. CERCLA -10-2000-0186, which also was signed by the SITC, EPA made the following findings in paragraph 14 of the administrative order on consent:

14. The presence of the chemicals described in paragraph 13 poses an imminent and substantial endangerment to human health or the environment because chemicals exceed screening or regulatory standards at locations where:

a) There is a potential for the chemicals to be ingested via consumption of groundwater contaminated at levels that exceed screening or regulatory criteria for drinking water;

b) There is a potential for hazardous substances to be ingested via consumption of contaminated natural resources;

c) There is a potential for current or future residents of the area to come in contact via direct contact or inhalation with the hazardous substances in soil that are contaminated at levels that exceed screening or regulatory criteria;

d) There is a potential for adverse impacts to the environment due to the presence of hazardous substances present in wetland surface water and sediments if wetland flora and fauna species are exposed to these hazardous substances;

e) There is a potential for adverse impacts to human health due to the presence of hazardous substances present in wetland surface water and sediments if contaminated flora and fauna are ingested or contact with contaminated wetland media occurs; and

f) There is a potential for adverse impacts to human health and welfare resulting from increased exposures [] during cultural activities of the Tribe, including subsistence, ceremonial or religious use of sites or resources.

The site cleanup to abate the threat was successfully completed under the oversight of EPA and the Tribe.

5. Nonmember activities on Tribal land

The Tribe's Supplemental Submissions provide additional information showing examples of nonmember activities on Tribal lands that negatively impact the water quality and beneficial uses of Reservation waters and that have the potential for impacts on the political integrity, economic security, and health or welfare of the Tribe and its members. See Table 2. "Actual or Potential Effects on Water Quality of Non-Member Activity on Trust Land," Exhibit 27 to First Supplemental Submission. As noted below, approximately 970 acres of the 4,610 acres of upland trust lands are leased to nonmembers for a variety of purposes, including industrial, commercial, agricultural, residential and recreational purposes.

One example of how nonmember activities on trust lands can affect water quality and the health and welfare of the Tribe and its members concerns a large campground and recreational vehicle park located on leased trust land that abuts the shoreline and through which Lone Tree Creek flows. The lower reach of Lone Tree Creek flows in a constructed channel through a campground sparsely vegetated with conifers, deciduous trees, and shrubs. Storm-water runoff within the lower reach of the sub-basin is collected in ditches and pipes that discharge to the Creek. The campground operates pump-out stations for recreational vehicles and a sewage lagoon and septic spray field. Different parts of this system may have failed at different times, introducing bacteriological contamination to the Creek from time to time. Lone Tree Creek enters Kiket Bay at Lone Tree Point Lagoon, where elevated bacterial levels have been measured, and which is a sensitive salt marsh wetland used by migrating salmonids. The Lagoon is also immediately adjacent to shellfish beds. Therefore, any pollution carried by the Creek directly impacts important fish and shellfish resources. Bald eagles and osprey also nest in this sub-basin.

The First Supplemental Submission describes in detail the leasing of trust lands within the Reservation to nonmembers for a variety of purposes, including industrial, commercial, agricultural, residential and recreational purposes. These activities generally have similar, but more direct, impacts on the Tribe and its members when they are carried out on trust lands as they do when carried out on nonmember lands. Approximately 970 acres of the 4,610 acres of upland trust lands (21%) are leased to nonmembers. See Map 3, Swinomish Indian Reservation – Leased Areas and Tribal Enterprises (2007), Exhibit 8 to First Supplemental Submission. For the most part, nonmember activities on trust lands within the Reservation are authorized by the Tribe or a member of the Tribe through lease arrangements governed by 25 U.S.C. § 415 and BIA regulations at 25 C.F.R. Part 131. The leases specifically incorporate federal regulations at 25 C.F.R. Part 162 by reference.

The Application includes a number of examples of leases that explicitly require the lessee to comply with SITC law. The lease of a one hundred -plus acre campground requires the lessee to "post the subject property notifying . . . [nonmembers who use the campground] that they are subject to Tribal laws and law enforcement while present within reservation boundaries." Lease

Amendment No. 2 to Campground Lease, ¶ XXXI, attached as Exhibit 15 to the Initial Application. Similarly, numerous residential leases contain language requiring the lessee to abide by tribal law as a condition of the lease. One common clause is that “[i]t is a condition of this lease that the Lessee shall faithfully comply with all ordinances or resolutions, as approved by the Secretary of the Interior, enacted by . . .” the Swinomish Indian Tribal Community. Samples of Residential Leases ¶ 18, attached as Exhibit 16 to the Initial Application. Such leases also contain a provision requiring the lessee to “promptly pay all taxes, assessments, license fees and other like charges levied against the Lessee by the Tribe during the term of the lease.” *Id.* at ¶ 19. Another common provision of residential leases is captioned “Observance of Law” and requires the lessee to “observe and adhere to all laws, ordinances, rules and regulations now or hereafter adopted by the Swinomish Indian Tribal Community.” More Samples of Residential Leases, § 4, were attached as Exhibit 17 to the Initial Application. Similarly, the two master leases for the gated residential community both require the lessee to “comply with all applicable water pollution control laws . . . in the construction of all sewerage systems, sewerage treatment or disposal plants or systems, or in the improvement or extension of any sewerage plant or sewage treatment or disposal plants.” *See* Excerpts of Lease Numbers 5020 and 5086, attached as Exhibit 18 to the Initial Application.

The Application also describes nonmember use of facilities owned by the Tribe or individual members of the Tribe, including the use of rights-of-way and easements on trust lands. Several major thoroughfares, railroads, and natural gas and oil pipelines cross fee and trust lands within the Reservation. *See* Exhibit 17 to First Supplemental Submission. The Application also describes permits and contracts with nonmembers by which nonmembers are authorized to use Reservation lands, waters or other natural resources. The presence of nonmembers on such lands within the Reservation is usually only by permission from the Tribe or a Tribal member, and the Tribe or Tribal member may exclude nonmembers from lands to which the Tribe or their members hold the fee or beneficial title.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

Reply To
Attn Of: ORC-158

APPENDIX II

**RESPONSE TO COMMENTS ON THE SWINOMISH INDIAN TRIBAL COMMUNITY
APPLICATION FOR TREATMENT IN THE SAME MANNER AS A STATE (TAS)
FOR SECTIONS 303(c) AND 401 OF THE CLEAN WATER ACT**

As noted in the attached Decision Document, the State of Washington was offered the opportunity to review the Tribe's assertion of authority in the Tribe's Application, and to identify any competing jurisdictional claims. And in a second comment opportunity, the State was offered the opportunity to review EPA's Proposed Findings of Fact concerning the Tribe's authority to administer the water quality standards program for nonmember activities within the Reservation. Comments were submitted to EPA by the State of Washington as follows:

1. By letter dated August 4, 2006, the Director of the State of Washington Department of Ecology submitted comments on the Tribe's assertion of authority in its Application.
2. By letter dated October 26, 2007, the Director of the State of Washington Department of Ecology submitted comments on EPA's Proposed Findings of Fact and the First Supplemental Submission to the TAS, and forwarded correspondence from a citizen.

Comments on the Tribe's Application

1. Comment: While the State agreed with the approach EPA has established for evaluating the Tribe's inherent authority, the State asked that EPA review the Application to determine whether the Tribe has demonstrated serious and substantial impacts on a water body specific basis in making EPA's Montana-test determination regarding the Tribe's authority over the activities of nonmembers.

EPA Response: Consistent with the Clean Water Act and applicable case law, EPA fully analyzed the Tribe's inherent authority to regulate the activities of nonmembers on the reservation for purposes of the Clean Water Act water quality standards program. The Tribe has submitted an Application and supplemental materials showing serious and substantial impacts that take place or may take place as the result of nonmember activities within each of the major watersheds of the Reservation. The Tribe has shown facts that there are surface waters within the Reservation used by the Tribe or its members (and thus that the Tribe or its members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters of the Reservation are resources subject to protection under the CWA. The Tribe has

further shown that impairment of waterbodies in each watershed by the activities of nonmembers on lands within the Reservation has or may have a direct effect on the political integrity, economic security, and health or welfare of the Tribe that is serious and substantial. EPA believes that the information provided by the Tribe adequately demonstrates its inherent authority to establish water quality standards for all water bodies within the Reservation. Further, the State has not disputed the Tribe's authority over water bodies in general or any particular water body.

2. Comment: The State requested that EPA carefully assess the Reservation boundaries, which the State wrote it has not undertaken to separately analyze.

EPA Response: EPA has carefully analyzed the Reservation boundaries to identify accurately the water resources within the borders of the Reservation as provided by Sec. 518(e)(2) of the CWA and 40 C.F.R. § 131.8(a). As part of EPA's review of the Application, we have examined numerous documents provided by the Tribe, including but not limited to the Treaty of Point Elliott, which created the Reservation; the Executive Order of September 9, 1873, regarding the Reservation; historic and present-day maps, surveys, charts, and aerial photographs depicting Reservation lands (including tidelands) and bordering water bodies; correspondence from federal, State, and local governmental entities recognizing specific lands to be within the Reservation boundaries; and other documents that describe the Reservation and its boundaries. As noted below, much of that information is contained in the Second Supplemental Submission to the Tribe's TAS Application; EPA sent a copy of the Second Supplemental Submission to the Washington Department of Ecology. The Second Supplemental Submission provides a great deal of background and a detailed explanation of the Reservation boundaries depicted in the Application and includes a number of attached exhibits, including a historical maps and documents. EPA is satisfied that the Tribe has adequately identified the Reservation boundaries as to which the Tribe is asserting, for TAS purposes, inherent authority to regulate water quality and that the Tribe has adequately identified the waters to which water quality standards of the Tribe would apply. The State has not asserted a competing or conflicting claim.

3. Comment: The State asked that EPA consider past litigation over the federal reserved water rights, and consider the State's obligation to properly manage water sources.

EPA Response: EPA believes that neither CWA Sec. 518 nor TAS status directly affect water rights, and that the issues with regard to particular water rights are not relevant to the demonstration of this Tribe's inherent authority to administer the CWA water quality standards program.

4. Comment: The State asked that EPA ensure that the Tribe's water quality standards are compatible with Washington's, which the State believes is especially important for waters that are shared by the two jurisdictions.

EPA Response: EPA's long-standing position, which has been upheld by various federal courts, is that nothing in the Clean Water Act precludes either a Tribe or a State from adopting water quality standards more stringent than those required under the Act. EPA's view has been that because of Sec. 510 of the Act, it may not disapprove either Tribal or State standards solely on the grounds that the standard is too stringent, nor will it resolve a conflict between standards by disapproving a Tribal or State standard and Federally promulgating a less stringent standard. In fact, Congress contemplated the possibility of conflicting standards and disputes in the 1987 amendments to the Clean Water Act, which provided for the Administrator of EPA to promulgate regulations to:

“... provide a mechanism for the resolution of any unreasonable consequences that may arise as the result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water.”
33 U.S.C. § 1377(e)

On December 12, 1991, EPA published regulations describing the “Dispute Resolution Mechanism,” at 40 C.F.R. § 131.7 (56 FR 4894).

Still, EPA agrees that it is in the interests of EPA, the Tribe, and the State to work together to minimize the potential for such disputes. EPA encourages the development of agreements that explicitly describe how the Tribe, State, and EPA will coordinate and communicate in the management of water quality issues to more efficiently and effectively implement the Clean Water Act.

5. Comment: The State also asked that EPA delineate permit issuance authority over all boundary waters, and it expressed a willingness to consider intergovernmental agreements that will insure coordinated, effective and responsible environmental protection.

EPA Response: EPA appreciates the State's willingness to work toward coordinated environmental protection. EPA further notes that the Tribe is not seeking, and EPA is not approving, eligibility or approval of a permit program under Sec. 402 or 404 of the CWA. EPA will continue to be responsible for issuing National Pollution Discharge Elimination System (NPDES) Permits under Sec. 402 of the CWA for discharges to waters of the Reservation.

Comments on the EPA's Proposed Findings of Fact

1. Comment: Washington Department of Ecology wrote that the Reservation boundaries described in the Proposed Findings of Fact do not match the boundaries in Ecology's GIS layer for identifying impaired waters, and it asked for more detailed information to update its information.

EPA Response: As already noted, EPA worked with the Tribe to clarify the location of

the boundaries in the Tribe's TAS Application. The Tribe's Second Supplemental Submission provides a great deal of background and a detailed explanation of the Reservation boundaries depicted in the Application and includes a number of attached exhibits, including historical maps and documents. As explained by the Tribe, the most significant difference between the Tribe's maps and Ecology's GIS map is that the Ecology map does not include the tidelands of the Reservation, which extend to the extreme low tide mark. The Tribe also noted that while the maps in the TAS Application provide a good general representation of the tideland boundaries, it recognizes the actual Reservation tideland boundaries may differ from those depicted in the TAS Application maps because the extreme low water mark is not permanently fixed. In addition, the Second Supplemental Submission addressed several features to the east of the Swinomish Channel that are within the Reservation, but are not included on the Ecology map. EPA stresses that the Reservation boundaries described in the TAS Application and in this TAS decision are for the limited purpose of showing that the Tribe has shown that it meets the TAS eligibility requirements of 40 C.F.R. 131.8(a)(3) and is not a final determination of the Reservation boundaries for other purposes. EPA will continue to work with Ecology and the Tribe to accurately depict the boundaries of the Reservation waters for purposes of managing water quality.

Comments forwarded by the State

No citizens, organizations, and local governments submitted comments in response to a public notice that EPA published in local newspapers to notify interested parties as to the Tribe's Application. However, a citizen submitted two sets of comments by email regarding the Proposed Findings of Fact and the State forwarded those comments to EPA. Neither set raised any significant legal issues about the Tribe's jurisdiction, and many of the comments did not address jurisdiction at all. Consistent with its practice, EPA is summarizing and responding to the comments received.

1. Comment: The commenter argued that EPA should not approve the Tribe for TAS because nonmembers have a limited voice in tribal government, and generally cannot vote in tribal elections.

EPA Response: CWA Section 518 authorizes EPA to treat an eligible Indian tribe in the same manner as a State for purposes of carrying out water quality standards management functions for reservation waters within tribal jurisdiction. The statute directs that EPA base its decision on whether the tribe demonstrates as follows: that "the Indian tribe has a governing body carrying out substantial duties and powers," that "the functions to be exercised by the Indian tribe pertain to the management and protection of water resources * * * within the borders of an Indian reservation," and that the "tribe is reasonably expected to be capable * * * of carrying out the functions to be exercised in a manner consistent with the terms and purposes of" the Clean Water Act and "of all applicable regulations." CWA §§ 518(e)(1)-(3). *See generally* 56 FR 64876, 64885 (December 12, 1991)(Preamble to EPA water quality standards regulation

noting inappropriateness of considering factors not listed in statute). EPA has approved the Tribe's Application, based on its determination that the Tribe meets those statutory requirements.

2. Comment: The commenter asserted that tribal authority over nonmembers is unnecessary because the State already has authority to manage water quality.

EPA Response: The Clean Water Act expressly authorizes EPA to approve eligible tribes to manage water quality for reservation water resources. EPA has not approved the State of Washington to establish water quality standards within the Swinomish Indian Reservation.

3. Comment: The commenter wrote that having the Tribe set water quality standards will give the Tribe unfair control over, or the opportunity to discriminate against, non-Tribal industries.

EPA Response: In reviewing state or tribal water quality standards for approval under the Clean Water Act, EPA considers whether the standards are consistent with the requirements of the Act and its implementing regulations.

4. Comment: The commenter asserted that the Tribe should not be approved for TAS because the Tribe lacks authority over lands it does not own, and should not have authority over fee lands.

EPA Response: The Clean Water Act authorizes eligible tribes to set water quality standards for reservation waters over which the tribe demonstrates jurisdiction, without regard to who owns the lands adjacent to those waters. Further, this approval applies only to waters of the Swinomish Indian Reservation.

April 11, 2008

RE: Decision to Approve the Swinomish Indian Tribal Community as eligible for "treatment in the same manner as a state" or "TAS" to administer water quality standards and water quality certifications, pursuant to Sec. 518(e) of the Clean Water Act

- The Swinomish Indian Tribal Community (the Tribe) submitted an application dated June 14, 2006, seeking eligibility to administer the water quality standards program and issue 401 certifications under the CWA.
- The Washington Dept. of Ecology commented on the application by letter dated Aug. 4, 2006, writing: "The State of Washington supports the Swinomish Tribe's application for treatment in the same manner as a state under the Federal Clean Water Act. We are committed to working with the Tribe to establish compatible standards on common water bodies and cooperative and coordinated programs."
- By letter dated June 28, 2007, the Tribe submitted additional information to supplement the application.
- By letter dated September 20, 2007, EPA offered Washington an opportunity to comment on the Proposed Findings of Fact document. At that time, we published notices of the comment opportunity in two local newspapers and placed copies of the materials in two local libraries
- By letter dated October 26, 2007, the State of Washington submitted comments to EPA on the Proposed Findings of Fact and forwarded one comment from a private person.
- In its comments, the Washington Department of Ecology wrote that the Reservation boundaries described in the Proposed Findings of Fact do not match the boundaries in Ecology's GIS layer for identifying impaired waters and it asked for more detailed information to update its information.
- We have worked with the Tribe to clarify the basis for the boundaries displayed in the Tribe's TAS application. Based on those discussions, the Tribe submitted to EPA its Second Supplemental Submission by letter dated February 20, 2008, which EPA forwarded to Ecology.
- The most significant difference between the Tribes' maps and Ecology's GIS map is that the Ecology map does not include the tidelands of the Reservation, which extend to the extreme low tide mark. The Tribe also noted in its February 20, 2008 supplement that while the maps in the TAS Application provide a good general representation of the tideland boundaries, it recognizes the actual Reservation tideland boundaries may differ from those depicted in the TAS Application maps because the extreme low water mark is not permanently fixed.

- In the TAS Decision Document at p. 7, and in Appendix II Response to Comments, comment 2, we write that the Reservation boundaries described in the TAS application and in this TAS decision are for the limited purpose of the TAS decision, and do not represent a final determination of the Reservation boundaries.
- The only comment by a private individual included several complaints about the authority of Indian tribes, which have been lodged in comments about other TAS applications and for which EPA has already prepared responses.
- On March 4, 2008, Rich McAllister, Assistant Regional Counsel, Region 10, was contacted by Melisa Gildersleeve, Washington Department of Ecology, Water Quality Manager, who had received a copy of the Second Supplemental Submission, and she said that EPA should proceed with the TAS decision and Ecology would use the information provided by the Tribe to update its maps.
- The Decision Document and Appendices I and II have been reviewed by the Office of General Counsel, the American Indian Environmental Office, and by the Office of Water's Office of Science and Technology, and all comments have been addressed.
- The Decision Document and its Appendices, and the letter to Chairman Cladoosby have been reviewed and concurred upon by the Office of Regional Counsel and the Office of Water and Watersheds, and we have notified the Tribal Trust and Assistance Unit of the impending TAS approval.

Anticipated Reactions to this Approval

- The Tribe will be pleased with the approval; the Tribe is preparing its water quality standards for public participation before adoption.
- All of the State's comments have been supportive of the Tribe's Application, with no objections. It is our understanding that the State and Tribe have established good working relationships.

Recommendation:

- 1) Sign the Decision Document that approves the Tribe as eligible for TAS, and
- 2) Sign the letter to Chairman Cladoosby that informs the Tribe of the TAS approval.